

A Constitutional Court Silencing its Critics

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Khemthong Tonsakulrungruang Di 20 Mrz 2018

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After twenty years of operation, the Thai Constitutional Court has finally got its first statute that lays out details of procedural rules. The Organic Act on the Procedure of the Constitutional Court B.E. 2561 (2018) is long overdue. A decade of political chaos had prevented the Parliament from passing the law until the military took power in 2014. The junta-appointed National Legislative Assembly expected it to facilitate the Court through the foreseeably turbulent future. Ironically, turbulences might come from the law itself.

Section 38 authorizes the Court to upkeep the order of the trial and, if necessary, the Court may order an individual or a group to act, or refrain from committing a specific act, so the trial could proceed in an orderly and timely manner. Violation of the law can result in either a reprimand, an expulsion from the Court, or up to a month of imprisonment. The exemption is that if a person who criticizes a decision in good faith and a polite manner, that act will not be considered a contempt of court.

Prior to Section 38, the Constitutional Court judges had been protected by the defamation law and, if a crime was done via computer, the computer crime act. When its former staff released damaging video clips of judges being lobbied in a high-profile case, or of judges discussing about rigging an examination to the Court's Office for their children, the Court exercised these laws to block public access to these clips and prosecuted its disgruntled employee. But these laws required formal criminal trial. In contrary, Section 38 rested the matter in the Court's hand. It is faster and completely under the Court's own discretion, an extra layer to protect the Court from undue attacks.

Contempt of court is not unheard of. The Court of Justice enjoys a similar protection, which is necessary for preserving integrity and enabling it to hear a case. But Section 38 is different. It actually criminalizes two behaviours: first, obstruction of a trial, and second, criticizing the Court. The first offence is normal. It is the second crime that concerns the public. Political context is needed in order to understand why this section is so controversial.

A powerful player

Since its establishment in 1998, the Constitutional Court of Thailand has witnessed its high, and low. The Court showed a promising start when it invalidated a few archaic laws on ground of equality and freedom, as well as banishment of corrupt politicians. But it proved too moderate and slow to scrutinize the corruptions and abuses of power of the businessman-cum-prime minister, Thaksin Shinwatra. It was even accused of being tampered by the notorious PM. Its dwindling credit led to a temporary disband during the 2006 coup, possibly the lowest point in the history. But when the Court resumed in 2007, new judges were picked from conservatives who allegedly sympathized with the anti-Thaksin camp. Since then, the Court aggressively exercised judicial review and asserted its

authority into politics, the phenomenon known as judicial activism. This radical stance polarized public opinion. Some praised the heavy-handed approach, which they believe would discipline evil politicians, while others feared that the separation of power and neutrality were lost. Only Thaksin's men got punished and his enemies were always acquitted. Nevertheless, all agreed that the Court became a powerful player, ultimately a game-changer. Decisions to disqualify a PM, or dissolve the government party, or block important policies, abruptly tilted the playing field in favour of the opposition. Decisions become no less important than an election in forming or sabotaging a government. The latest was a series high-profile cases that eventually created a power vacuum, paving the way for the 2014 coup. The Court has been idle under the dictatorship, but judicial activism is still much alive. The Court has earned trust from the anti-Thaksin party to be appointed the constitutional arbiter. Under the 2017 Constitution, the jurisdiction has significantly expanded, invading into discretion of the executive, e.g. enforcing policies set out by the constitution. Also, the Organic Act permits the Court to exercise more discretion in determining the admissibility of evidence. It may allow evidence that is unlawfully obtained or reject some evidence on ground of national security.

Despite broad powers, the Court is subject to virtually no check. The Court's impunity stems from both constitutional design and the reality of Thai politics. The Constitution emphasizes the judiciary's independence. Its selection, salary, and budget are immune from political oversight. Although a judge may be disqualified if he is convicted of a serious crime, or impeached by three-fifth of the Senate, the chance is highly unlikely. The judiciary, watchdog agencies, and the Senate are long dominated by a small band of conservative elites who would refuse to investigate, convict, and remove their own peers. Within the Court, there is no appellate body to review a decision. Thus, holding the Court accountable is difficult.

But great power cannot go unchecked. Many decisions are, at best, controversial, while others are wrong. In 2001, Thaksin was acquitted because the Court miscalculated the majority votes. The decision was later described as the root of all subsequent troubles. In a rush to end the 2008 siege of international airports by anti-Thaksin demonstrators, the Court skipped the final presentation from the defendant and dissolved Thaksin's proxy, the People's Power Party. It bypassed the procedure described in Section 68 of the 2007 Constitution and accepted the constitution amendment case directly petitioned to it. Later, it nullified a 2014 general election, blaming the government for failing to prevent violence from anti-Thaksin mobs. It went on to remove PM Yingluck Shinawatra even when she dissolved the House. It endorsed the broad and ambiguous Referendum Act that silenced opponents of the junta, helping it to win in the constitutional referendum of 2016. These are just a few examples. In any case, these mistakes and controversies deserve thorough discussion, even criticism. The more the Court is involved in politics, the more crucial it must be subject to critique from laypersons, politicians, journalists, or scholars. Public criticism serves as a mechanism to hold the Court accountable, regardless of how weak this mechanism is. Without check, great power quickly descends into arbitrariness.

The law is not draconian, for it exempts criticism in good faith and a polite manner. But these terms are vague. It is doubtful that, given the Court's highly polarized performance, application of the law will be just and fair. One harsh sentence on a scholar is enough to

send a chilling effect to the whole community, effectively muting opinions.

In recent years, even the Court of Justice has increasingly used the charge in political cases. In these cases, disorder is unavoidable. Emotion is high. Cheering crowds, angry mob, and an army of reporters come to observe the life and death of their political leaders, a reminder of why contempt of court is necessary. But as more anti-junta activists are given long jail terms and heavy fines for trivial activities, such as holding a press conference or symbolically expressing dissent within the vicinity of the court, people begin to question if the offence is being abused to silence critics of the justice system, and the military regime.

The Constitutional Court is assigned the duty of upholding democracy and the rule of law. But democracy needs freedom of expression and the check-and-balance. The rule of law means a fair trial by an impartial court. Impartiality, fairness, and free speech have already been scarce and fragile. Section 38 would further inflame the problem.

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